(6)

No. 92-7549

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THOMAS N. SCHIRO,
Petitioner,
v.

RICHARD CLARK, Superintendent
Indiana State Prison and
INDIANA ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PETITIONER

MONICA FOSTER *
(Appointed by this Court)
HAMMERLE AND FOSTER
500 Place
501 Indiana Ave. Suite 200
Indianapolis, IN 46204
(317) 630-0137

RHONDA LONG-SHARP
Indianapolis, IN
IRA MICKENBERG
New York, NY
Counsel for Petitioner

* Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

Whether the double jeopardy clause of the fifth amendment prohibits imposition of the death penalty on Thomas Schiro after the jury at his guilt trial implicitly acquitted him of the offenses that the state is required to prove beyond a reasonable doubt as the predicate for a death sentence?

Whether the fifth amendment doctrine of collateral estoppel bars the prosecution from obtaining Schiro's death sentence by relitigating elements of the offenses of which his trial jury implicitly acquitted him at the guilt trial, when the state is required to prove those same elements beyond a reasonable doubt as the precondition for a death sentence?

PARTIES TO THE ACTION

The names of all parties to the action in the court below appear in the caption of this case.

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OPINIONS BELOW

On August 5, 1983, the Indiana Supreme Court affirmed, by a 3-2 majority, Schiro's convictions and death sentence on direct appeal. *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983). Certiorari was denied. *Schiro v. Indiana*, 464 U.S. 1003 (1983).

On June 28, 1985, the Indiana Supreme Court affirmed, by a 3-1 majority, the denial of Schiro's first state post-conviction relief petition. *Schiro v. State*, 479 N.E. 2d 556 (Ind. 1985). Certiorari was denied. *Schiro v. Indiana*, 475 U.S. 1036 (1986).

On February 8, 1989, the Indiana Supreme Court issued an opinion affirming, by a 3-2 majority, the denial of Schiro's second state post-conviction relief petition. *Schiro v. State*, 533 N.E.2d 1201 (Ind. 1989). Certiorari was denied. *Schiro v. Indiana*, 493 U.S. 910 (1989).

On December 26, 1990, the district court denied habeas corpus relief. *Schiro v. Clark*, 754 F. Supp. 646 (N.D. Ind. 1990). On May 8, 1992, the Seventh Circuit Court of Apeals affirmed the district court's denial of habeas corpus relief. *Schiro v. Clark*, 963 F.2d 962 (7th Cir., 1992). Rehearing and Suggestion for Rehearing En Banc was denied, without opinion, by the circuit court on September 8, 1992.

On May 17, 1993, this Court granted certiorari.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review decisions of the federal courts of appeals is invoked pursuant to 28 U.S.C. § 1254(1) and United States Supreme Court Rules 10 and 16. On May 8, 1992, the circuit court affirmed the district court's denial of habeas corpus relief. *Schiro v. Clark*, 963 F.2d 962 (7th Cir. 1992). On September 8, 1992, the Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the court of appeals without opinion. See *infra*, Appendix, pg. 5a.

By Order dated December 1, 1992, Justice Stevens extended the time for filing the Petition for Writ of Certiorari to and including February 5, 1993. On February 5, 1993, the Petition for Writ of Certiorari was docketed. The Brief in Opposition was filed on or about April 22, 1993. The Reply Brief of Petitioner was filed on or about April 28, 1993.

The Court granted certiorari on May 17, 1993. On June 17, 1993, the time for filing the brief of petitioner was extended to and including July 13, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. Constitutional Provisions Which The Case Involves

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT 14

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. State Statutory Provisions Which The Case Involves

Indiana Code § 35-41-2-2

(a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

(d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

Indiana Code § 35-41-4-3(2)

This provision of the state code sets forth when a subsequent prosecution is barred and is reprinted in the appendix to this brief.

Indiana Code § 35-42-1-1

A person who:

(1) knowingly or intentionally kills another human being; or

(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery;

commits murder, a felony.

Indiana Code § 35-50-2-9

This provision of the state code sets forth the death penalty provisions of state law and is reprinted in the appendix to this brief.

STATEMENT OF THE CASE

A. Trial Proceedings:

Schiro was charged with three counts of murder [1] for the death of a single victim: Count I, "knowing" murder (hereinafter referred to as *"mens rea* murder"); Count II, murder in the commission of a rape (hereinafter referred to as "felony murder—rape"); and Count III, murder in the commission of criminal deviate conduct (hereinafter referred to as "felony murder—criminal deviate conduct") [J.A. 3-5].

The state's theory at trial was that Schiro gained entry, under false pretenses, into the decedent's home. After Schiro and the decedent conversed and the decedent refused to engage in sexual intercourse, Schiro raped her [Tr.R. 1426-27, 829-830, 646]. Sometime later, Schiro fell asleep and was awakened by the decedent who was attempting to leave the house [Tr. R. 1428]; he stopped her, assaulted and killed her [Tr. R. 1428-29, 647]. These events took place over a number of hours.

The defense acknowledged the killing and conceded that Schiro caused it.[2] The principal dispute was whether

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[1] Ind. Code § 35-42-1-1 defines murder. It provides that: "[a] person who: (1) knowingly or intentionally kills another human being; or (2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, rape or robbery; commits murder, a felony."

[2] Schiro was living in a half-way house when the crime was committed. The weekend following the killing he confessed to state's witness, Mary Lee who was his girlfriend at the time [Tr. R. 1420, 1425-31].

Since the decedent's vehicle had been recovered near the half-way house, personnel there were directed to review the sign-in sheets to make sure all clients were signed in at the time the crime occurred [Tr. R. 1003-05]. They had discovered nothing unusual regarding the sign-in sheets [Tr. R. 1020]. Schiro approached his counselor and told him he needed to talk about something "heavy" that was

Schiro "knowingly" killed or whether, instead, the killing was the product of a sick mind plagued by a belief system ingrained with bizarre sexual ideation.

The dispute about Schiro's mental state began in pretrial pleadings [3] and continued throughout trial. The jury heard testimony from five mental health professionals: two were court-appointed; one was called by the state; and two were called by the defense. All professionals agreed that Schiro had some form of mental illness; they disagreed about the appropriate label and whether the illness constituted legal insanity.[4]

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more serious than his drug and alcohol problems [Tr. R. 1017-18]. Schiro said he could not handle this problem by himself [Tr. R. 1018]. The counselor sent Schiro to Ken Hood, the director of the half-way house [Tr. R. 1019]. Schiro confessed his involvement in the crime to Hood [Tr. R. 903]. Hood asked how that was possible when the sign-in sheet indicated he was at the facility when the crime occurred [Tr. R. 903-04]. Schiro then confessed that he had falsified the sign-in sheet [Tr. R. 904].

Schiro additionally confessed to defense expert, Dr. Frank Osanka. Dr. Osanka testified that Schiro was very forthcoming with him [Tr. R. 1689] and that Osanka was surprised by the fact that Schiro's statements were corroborated by other persons and the police investigation of the case [Tr. R. 1688-89, 1741]. Dr. Osanka was called in the defense case-in-chief and recounted Schiro's confession to him [Tr. R. 1738-52].

[3] See generally, discussion at pp. 42-43 and fn. 37-40.

[4] Dr. David Crane, testified that there was no "question" that Schiro suffered from "emotional difficulties" of "long standing duration" [Tr. R. 1871]. Court psychiatrist Dr. Bernard Woods concluded that Schiro was mentally ill but that the mental illness suffered by Schiro would not bring him within the legal definition of insanity. [Tr. R. 1415-16]. He interviewed Schiro on one occasion for 1¼ hours [Tr. R. 1401]. Court psychiatrist, Dr. Charles Crudden, acknowledged that Schiro had a history of suicide attempts [Tr. R. 1204]. Although he too interviewed Schiro on one occasion for approximately one hour [Tr. R. 1275], he noted that Schiro had a "blunted affect" [Tr. R. 1219], exhibited pressured or rapid speech patterns to the extent that Dr. Crudden was unable to take

Many state's witnesses had an opportunity to observe Schiro's personality or behavior and were cross-examined on that topic.[5] The defense case consisted entirely of mental health evidence [Tr. R. 1507 et seq.]. The jury heard evidence about Schiro's delusional system. Among other facts, including Schiro's inappropriate and bizarre sexual behavior, the jury heard extensive testimony regarding Schiro's affection for a mannequin in a department store window. This testimony included: a recount of instances where Schiro would talk to the mannequin; where he would become upset when her clothes and/or wig were changed; where he would apologize to the mannequin because of his relaionship with another woman; and times when he would take people downtown to see her [Tr. R. 1469-70].[6]

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complete notes [Tr. R. 1182, 1268]; and that there was substantial digression in Schiro's speech patterns [Tr. R. 1269]. He also noted that Schiro's level of functioning had deteriorated [Tr. R. 1221]. Dr. Crudden, concluded that Schiro was not "insane" [Tr. R. 1219].

Each of the above experts determined that Schiro suffered from sexual dysfunction and two concluded that the closest appropriate diagnosis was sexual sadism [Tr. R. 1228, 1396]. Defense experts, Drs. Frank Osanka and Edward Donnerstein, concluded that Schiro was insane [Tr. R. 1639-40, 1692, 1752-54]. Osanko opined that Schiro suffered from paranoid schizophrenia [Tr. R. 1692]. He interviewed Schiro and his family for over fifty hours [Tr. R. 1683] and reviewed numerous documents, specifically requesting documentation generated prior to the instant offense [Tr. R. 1681, 1690-1].

[5] This testimony included the following: that Schiro began biting his fingernails in grammar school [Tr. R. 1507] and by the time he reached adulthood had chewed off his fingertips due to nervousness [Tr. R. 991, 1472, 1734]; that although Schiro was then residing in a half-way house, two weeks prior to the killing he requested transfer to another facility which provided more intensive counseling [Tr. R. 1031-33]; that he exhibited a decline in occupational functioning [Tr. R. 1080-82] and in personal hygiene [Tr. R. 1471].

[6] The majority of this evidence came from state's witness Mary Lee [Tr. R. 1418-1491]. Lee was Schiro's girlfriend at the time of

The trial court's instructions at the close of the evidence defined the possible mental states relevant to the *mens rea* murder charge [J.A. 22]. The court instructed that "[a] person engages in conduct 'knowingly' if, when he engages in the conduct he is aware of a high probability that he is doing so," and that "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." [J.A. 22].[7]

The case was submitted to the jury with ten (10) possible verdict forms:

1. Guilty as charged on Count I;
2. Guilty as charged on Count II;
3. Guilty as charged on Count III;
4. Guilty of the lesser included offense of voluntary manslaughter;
5. Guilty of the lesser included offense of involuntary manslaughter;
6. Not guilty;
7. Not guilty by reason of insanity;
8. Guilty of Murder, but mentally ill;
9. Guilty of voluntary manslaughter, but mentally ill; and
10. Guilty of involuntary manslaughter, but mentally ill.

[J.A. 37-38]

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the crime [Tr. R. 1419-20]. Lee's testimony is set forth in more detail *infra* at fn. 30 and 32.

[7] At the guilt phase, during both preliminary and final instructions, the court specifically instructed that Schiro could be convicted of mens rea murder if the state proved beyond a reasonable doubt that Schiro knowingly *or* intentionally killed [J.A. 11, 21, 22-23]. The jury was also instructed on the definitions of both mental states [J.A. 22]. The mental state of "intentionally" applied only to *mens rea* murder. The state did not object to these instructions.

During deliberations the jury sent out a request to the court [J.A. 39] which is not contained in the record. In response, and by agreement of the parties, the court reread three instructions to the jury [J.A. 39]:

1. The defense of insanity and the definition of "mental disease or defect" [J.A. 22];
2. The definition of criminal deviate conduct [J.A. 30]; and
3. The verdict of guilty but mentally ill and the definition of "mentally ill." [J.A. 30].

After five hours of deliberation [Tr. R. 107], the jury expressly found Schiro guilty of Count II, felony murder —rape [J.A. 37]. This charge required no *mens rea* as to the killing—the only *mens rea* element was the intent to commit the underlying felony of rape. The jury did not return a verdict on either the murder charge which required an intent to kill (Count I, *mens rea* murder) [J.A. 37], or on Count III (felony murder—criminal deviate conduct) [J.A. 38]. Judgment was entered on the verdicts the day they were rendered [Tr. R. 128, 137].

A few days later, the jury was reassembled to consider whether Schiro should suffer the penalty of death. Under Indiana law, the state may seek the death penalty by alleging, in a document separate from the charge, the existence of one or more statutory aggravating factors. Ind. Code §§ 35-50-2-9(a). In order to prevail on its death request, the state must prove, beyond a reasonable doubt, the existence of each element of at least one statutory aggravating circumstance. Ind. Code § 35-50-2-9 (e)(1). If the state proves at least one aggravating circumstance beyond a reasonable doubt, the jury must then weigh any aggravators found against any mitigators found. Ind. Code § 35-50-2-9(e)(2).

In Schiro's case, the state alleged two aggravating factors: an *intentional* killing in the course of a rape; and

an *intentional* killing in the course of a criminal deviate conduct. See generally Ind. Code § 35-50-2-9(b)(1) [J.A. 6, 7]. Both aggravators required the state to prove beyond a reasonable doubt that Schiro entertained an "intentional" state of mind when he committed the killing. The evidence from the guilt trial was incorporated at the penalty trial; no additional evidence was offered by either party [Tr. R. 262-264].

Three verdict forms were provided to the jury at the close of the penalty trial:

1. A recommendation for the death penalty;
2. A recommendation against the death penalty; and
3. No recommendation.

[J.A. 40-41]

After deliberating for sixty-one minutes [Tr. R. 109], the jury returned a unanimous recommendation against the death penalty [J.A. 40]. The court accepted the jury's penalty trial recommendation and the jury was discharged [Tr. R. 130].

Approximately 18 days later, Schiro stood before the court for sentencing. Within minutes, the considered judgement of twelve members of the community was overridden and Schiro was sentenced to death.[8]

[8] In Indiana, the jury issues a recommendation to the court regarding sentencing. The court then ultimately determines the appropriate sentence. The court must base its sentence on the same standards the jury was required to consider. Ind. Code 35-50-2-9(e). On direct appeal, a majority of the Indiana supreme court refused "to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty." *Schiro v. State*, 451 N.E.2d at 1058. In 1989, the Indiana Supreme Court "develop[ed] a standard appropriate to the separate roles of judge and jury." *Martinez Chavez v. State*, 534 N.E.2d 731, 734 (Ind. 1989). "In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that vitrually no reasonable person could disagree that death was appropriate in light of the offender and his crime." *Id.* at 735.

B. Direct Appeal Proceedings

After briefing was completed, the Indiana Supreme Court found the "original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty." *Schiro v. State*, 451 N.E.2d at 1056. At the state's request, the supreme court remanded the case to the trial court so that it could clarify its reasons for imposing the death penalty. *Id.* The trial court did so on February 22, 1983 [J.A. 45-50]. In the revised findings and conclusions, the trial court again determined that the jury's life recommendation should be overridden and the death sentence imposed. The trial judge found the existence of one aggravating circum-

Although the judge override in Schiro's case was not reviewed under the *Martinez Chavez* standard, Schiro's case was distinguished therein: "[I]n *Schiro*, the trial court had reason to believe that the jury had been tricked into recommending against the death penalty. The defendant had tried to delude the jurors into thinking he was mentally unstable by rocking back and forth [only] in their presence." 534 N.E.2d at 733. However, the jury was well aware that Schiro sometimes rocked and sometimes did not because seven witnesses were asked whether they had previously witnessed Schiro rocking similar to the way he rocked in court. Mary Lee testified that Schiro frequently rocked [Tr. R. 1476]. Richard Egan, the officer who fingerprinted Schiro, stated that he rocked while he was being booked [Tr. R. 993]. Court psychiatrist, Dr. Crudden could not recall whether Schiro rocked during his interview [Tr. R. 1210-11]. Four witnesses testified that they had not previously witnessed Schiro rocking [Tr. R. 966, 1087-88, 1109, 1011]. This evidence was not discussed in the trial court's findings imposing the death sentence or in the state supreme court opinion.

Schiro's case is one of only two cases where the Indiana supreme court has upheld an override. Compare *Minnick v. State*, 544 N.E.2d 471 (Ind. 1989), with *Kennedy v. State*, 578 N.E.2d 633 (Ind. 1991); *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992); and, *Martinez Chavez, supra*. See also, *Thompson v. State*, 492 N.E.2d 264 (Ind. 1986) (reversed on other grounds).

stance: that Schiro "intentionally killed [the decedent] while committing or attempting to commit rape." *Schiro v. State*, 451 N.E.2d at 1058.

A majority of the Indiana Supreme Court affirmed Schiro's conviction and sentence on direct appeal. *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983).

C. Post-Conviction Proceedings:

In Schiro's first post-conviction action he raised two legal issues: (1) whether the trial judge was biased [9] and improperly considered Schiro's behavior during the course of the trial in sentencing him to death; [10] and (2) whether trial counsel rendered constitutionally ineffective assistance of counsel.[11]

In his second state post-conviction petition, Schiro argued that his death sentence stood in violation of the

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[9] A newspaper reporter testified that prior to the return of the guilt phase verdict, the trial judge stated, "we're going to fry the boy" [PCR1 R. 199]. The trial prosecutor's initial recollection of the judge's comment was, "I think the boy is going to fry" [PCR1 R. 185]. After talking with the judge prior to the post-conviction hearing, the prosecutor then recalled that the judge said, "I think the boy is going to die" [PCR1 189]. The trial judge testified that he stated, "soon we'll know whether he'll live or die" [PCR1 R. 171], and that he did not make up his mind until the day of sentencing whether the death penalty would be imposed. The state court concluded that, "[t]he comment made by [the trial judge], in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious." *Schiro v. State*, 479 N.E.2d at 561.

[10] Here Schiro alleged that the trial court improperly considered information not in evidence, specifically the court's belief that Schiro attempted to fool the jury by rocking in their presence, when it overrode the jury's sentencing determination. See fn. 8, *supra* at 10-11.

[11] The hearing court and the state supreme court found counsel was effective. *Schiro v. State*, 479 N.E.2d at 561.

double jeopardy clause of the fifth amendment as well as the fifth amendment's collateral estoppel doctrine. Post-conviction relief was denied by the trial court [J.A. 112-129]. By a 3-2 vote, the Indiana Supreme Court affirmed the denial of post-conviction relief on the merits.[12] In so holding, the court stated:

> The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under I.C.35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing [13] and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to I.C. 35-50-2-9, and the jury determined that the aggravating circumstance existed and that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct.[14] In

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[12] Since the state supreme court ruled on the claim on the merits, there is no bar to federal review. *Harris v. Reed*, 489 U.S. 255, 261 (1989); see also, *Ylst v. Nunnemaker*, 111 S. Ct. 2590, 2593 (1991); *Wainwright v. Witt*, 469 U.S. 412, 431, fn. 11 (1985).

[13] The state court erred when it determined that the jury never confronted the issue of whether the killing was intentional. In fact, the jury was specifically instructed that it could convict Schiro of *mens rea* murder if it found that "when the defendant [committed the killing] he knew the conduct would *or intended* the conduct to cause the death of [the decedent]", (emphasis added) [J.A. 23]. As discussed *infra* at 26-27, a "knowing" state of mind is a lesser state of mind than an "intentional" one.

[14] The state court erred when it notes that the jury determined that the aggravating circumstance existed. In fact, the jury never

> the same stattue, § (9)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made his.

Schiro v. State, 533 N.E.2d at 1208 (Ind. 1989) [emphasis added].

Two dissenting justices contended that Schiro was entitled to a reversal of his death sentence. They noted:

> The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. *Buckner v. State* (1969) 252 Ind. 379, 248 N.E.2d 348, *Smith v. State* (1951) 229 Ind. 546, 99 N.E.2d 417.
>
> . . . In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. [citation omitted] The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act.

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made such a finding. The jury did not reach such a finding at the guilt trial and then unanimously recommended *against* the death penalty [J.A. 37, 40]. Under Indiana law, the jury does not issue specific findings when issuing its penalty phase decision. *Bieghler v. State*, 481 N.E.2d 78, 86 (Ind. 1985), cert. den. 475 U.S. 1031 (1986).

> I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

Id. at 1208-1209 (DeBruler, J., dissenting).

Certiorari was denied. *Schiro v. Indiana*, 493 U.S. 910 (1989). Justice Stevens authored an opinion "respecting the denial of certiorari" which discussed the double jeopardy and collateral estoppel claims presented in this brief. Justice Stevens wrote:

> It cannot be disputed that petitioner was placed in jeopardy within the meaning of the Fifth Amendment to the Federal Constitution when the trial on Count I commenced. [citation omitted]. The fact that Indiana may not consider the jury's silence an "acquittal" as a matter of state law surely does not determine the constitutional question whether he could again be placed in jeopardy on the same charge [citation omitted]. Nor does it determine whether the action by the jury—especially when illuminated by its unanimous decision at the penalty hearing—should be given preclusive effect either under principles of double jeopardy in capital cases . . . [citation omitted], or under more general principles of collateral estoppel.

Id. (opinion of Stevens, J., respecting the denial of certiorari).

D. Federal Habeas Corpus Proceedings:

Thereafter, Schiro sought relief on the double jeopardy and collateral estoppel claims in federal habeas corpus proceedings. The federal district court denied relief on these claims finding that the silent verdicts did not constitute an acquittal under state law. *Schiro v. Clark*, 754 F. Supp. at 660. The court of appeals, likewise, concluded that the state court characterization of the silent

verdicts was binding upon the federal court, and was dispositive of the double jeopardy claim:

> In order to assess the effect of the jury's findings, this Court looks to state law. *United States ex rel. Young v. Lane*, 768 F.2d 834, 841 (7th Cir. 1985) . . . Since the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen.

Schiro v. Clark, 963 F.2d at 970 (emphasis in original).

This Court granted certiorari *Schiro v. Clark*, 113 S.Ct. 2330 (1993).

SUMMARY OF THE ARGUMENT

Schiro was charged with three counts of murder for the death of a single person. An essential element of Count I required the state to prove that Schiro "knowingly" killed. Counts II and III required no proof of any intent to kill. Each required the state to prove that Schiro committed a separate felony (rape and criminal deviate conduct, respectively).

Each charged count was submitted to the jury. The jury returned a guilty verdict only on Count II, felony murder—rape. It returned no verdict on either Count I or III. The jury's failures to convict on Counts I and III were implicit acquittals because the jury had the opportunity to convict but did not and because the facts of this case make it clear that the jury intended to acquit Schiro of Counts I and III.

Indiana law requires the state to prove all elements of at least one aggravating circumstance as a predicate for a death sentence. The state advanced two aggravating circumstances at Schiro's penalty trial. Each required the state to prove, beyond a reasonable doubt, that the killing was intentionally committed. Under state law, a

"knowing" state of mind is less than, and a necessary part of, an "intentional" state of mind. Consistent with the implicit acquittals at the guilt trial, the jury returned a recommendation that the death penalty not be imposed. Although at the guilt trial Schiro had been acquitted of the only charged offense which required an intent to kill, the trial court overrode the jury's sentencing recommendation and imposed the death penalty, finding that Schiro intentionally killed during a rape.

This death sentence cannot stand, consistent with the double jeopardy clause, because Schiro was implicitly acquitted at the guilt trial of the same offense which the trial court used as the sole aggravating circumstance to support the sentence.

Schiro's death sentence is also barred by the fifth amendment doctrine of collateral estoppel. The state's burden of proof at the guilt trial is the same as its burden of proof at the penalty trial in Indiana: beyond a reasonable doubt. The material factual dispute at the guilt trial was Schiro's mental state. This dispute was resolved against the state when the jury implicitly acquitted him of Count I, the Count requiring the state to establish that Schiro killed intentionally.

At the penalty trial, the state relied solely upon the same evidence and the same factual contentions which the jury had rejected at the guilt trial, again asking the jury and then the judge to find that the killing was intentionally committed. When the jury declined, the trial judge obliged. Such relitigation of facts once determined in Schiro's favor violates the fifth amendment.

ARGUMENT

ESTABLISHED PRINCIPLES OF DOUBLE JEOPARDY BAR IMPOSITION OF THE DEATH PENALTY BECAUSE SCHIRO WAS ACQUITTED AT THE GUILT TRIAL OF THE ELEMENTS OF THE ONLY APPLICABLE AGGRAVATORS

The issue in this case is whether Schiro's right not to be placed twice in jeopardy was violated when he was sentenced to death on the basis of findings in aggravation that necessarily subsumed the same offense and elements on which he had been acquitted by the jury at the guilt trial. See *Bullington v. Missouri*, 451 U.S. 430 (1980). The jury acquitted Schiro of *mens rea* murder at the guilt trial when it eschewed the state's argument that Schiro knowingly killed, and instead found that the killing was done in the commission of a rape. Despite this judgment, the state asked both the jury and the judge to find Schiro eligible for death and to impose a death sentence claiming he intentionally killed.

Schiro divides this argument into four parts. In part A., Schiro sets forth what determinations must be grounded in state law and what determinations are controlled by the federal double jeopardy clause. Schiro demonstrates that the issue of whether a jury's failure to convict a criminal defendant of a charge submitted to it is the constitutional equivalent of an acquittal is a question of federal law. In part B., Schiro shows why, under federal law, the jury's silent verdicts here amounted to acquittals. He demonstrates that the jury had a full opportunity to convict but did not; and that it intended to acquit and did acquit. In part C., Schiro demonstrates that since the elements of the alleged aggravators were the same as the elements of the acquitted offenses, the double jeopardy clause bars imposition of the death penalty. In part D., he demonstrates that fifth amendment principles of collateral estoppel barred the prosecution

from relitigating as the basis for a death sentence the crucial factual issue of intent to kill that the jury had resolved in Schiro's favor at the guilt trial.

A. The Determination of Whether a Silent Verdict Is an Acquittal for Double Jeopardy Purposes Is a Federal Issue; State Law Is Relevant Only To Determine the Factual Setting Under Which the Claim Arose.

1. *The proper interaction of state and federal law.*

In direct contravention of this Court's precedent, the lower court erroneously determined that Indiana law controlled the determination of whether there was an "implicit acquittal" in Schiro's case.[15] Simply put, the question of whether the facts at bar constitute an implicit acquittal is a federal question which cannot be resolved solely by citing to the state court's legal conclusion.

Double jeopardy questions customarily require an understanding of state law before the federal question can be properly identified and answered. For example, in *Brown v. Ohio*, 432 U.S. 161, 164 (1977), the Court began its analysis by first identifying the elements of the offenses under state law. Once that task was completed, the issue of whether double jeopardy was violated by the state's successive prosecutions for a lesser and greater offense was a federal question and was resolved based upon interpretations of the federal constitution. Likewise, in *Turner v. Arkansas*, 407 U.S. 366 (1972), the Court held the doctrine of collateral estoppel prohibited

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[15] The lower court rejected Schiro's double jeopardy claim, relying upon *United States ex. rel. Young v. Lane, supra*, finding the silent verdicts did not represent acquittals because the state court determined, as a matter of state law, that a silent verdict in a multi-count charge is not an acquittal for double jeopardy purposes. See, *supra* at 16. Unlike the opinion in *Young*, the lower court in Schiro's case did not engage in *any* analysis of whether the state court ruling violated federal double jeopardy rights. *Id.*

the state from trying Turner for robbery after he was acquitted of murder during the course of a robbery. This result was constitutionally required under the collateral estoppel prong of the double jeopardy clause even though state law prohibited a defendant from being jointly tried for murder and any other offense.

To be sure, the states are empowered, within broad limits, to define various criminal offenses, to establish penalties for violations of their laws, and to establish procedures by which disputes are resolved. See generally, *Patterson v. New York*, 432 U.S. 197, 201 (1977). The federal courts are nevertheless bound to determine whether the state procedures violate the federal constitution. State rulings concerning procedures established or the elements of various offenses must necessarily be consulted by the federal courts when ruling upon double jeopardy claims because it is those procedures which form the factual basis for the claimed federal violation. State court expositions of state law are not the end of the inquiry, but rather the beginning.

In a case analogous to Schiro's, the state court held that a ruling on a demurrer was not an acquittal for double jeopardy purposes. *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). There, the trial court sustained a defense demurrer at the close of the state's case. The state then sought to appeal that ruling. The state supreme court held that the ruling on the demurrer was not the functional equivalent of an acquittal because a ruling on the demurrer was a legal question that did not resolve facts in the defendant's favor. Thus, the state supreme court held that the prosecution could lawfully appeal the trial court's ruling.

This Court reversed, holding that the granting of a demurrer is, under fedral double jeopardy principles, an acquittal that would operate to bar the state's appeal of that ruling. In so holding, this Court noted:

> We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as "the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause]," [citation omitted], so too the Pennsylvania Supreme Court's characterization, *as a matter of double jeopardy law*, of an order granting a demurrer is *not* binding on us.

Id. at 144, fn. 5 (emphasis added), see also, *Ohio v. Johnson*, 467 U.S. 493 (1984) (state court ruling that guilty pleas to less serious offenses in multi-count indictment barred prosecution on more serious counts on double jeopardy grounds reversed by this Court).[16]

If the determination of what constitutes an acquittal, and hence a violation of the double jeopardy clause, were truly a matter of state law which the federal courts were required to accept, this Court would have been required

[16] Cases such as *Swisher v. Brady*, 438 U.S. 204 (1978) and *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) are not contrary. In each, this Court consulted state law to determine the parameters of the statutes which formed the factual basis of the claimed double jeopardy violations.

This Court also accepted the state court's description of the various state procedures involved. However, this Court did not accept the state court's resolution of the legal claim *carte blanche*. Rather, this Court applied the facts, i.e. the particular state procedures at issue, as found by the state courts, and applied federal double jeopardy principles to those facts to determine whether a valid double jeopardy claim was presented.

The Indiana scheme at issue in Schiro's case is vastly different than the statutory schemes confronted by this Court in *Lydon* and *Swisher*. In each of those cases, this Court found there was no acquittal because the fact finders in those cases did not have authority (under the state statutes) to enter binding judgments. Thus, in *Lydon* and *Swisher* jeopardy did not end with the entry of findings by the initial fact finders. In *Schiro* there is no state statute or rule that establishes that jeopardy ends at any time other than when the court accepts the jury's verdict.

to adopt the state court analysis in *Smalis* and *Johnson*. Rather, the issue of whether the double jeopardy clause has been violated is a federal issue, which must be resolved by the federal courts by looking to federal law. State law is consulted only to the extent that it bears on the facts of the claim.

As Schiro will show in part B, below, the federal question is controlled by settled precedents of this Court, including *Price v. Georgia*, 398 U.S. 323 (1970). *Price*, like *Johnson*, *supra*, and such cases as *Illinois v. Vitale*, 447 U.S. 410 (1980), would make no sense if state law were controlling with regard to the fifth and fourteenth amendment consequences of a jury's verdict in a state criminal trial.[17] For in *Price*, the Georgia courts had unequivocally held that as a matter of Georgia law, the manslaughter verdict did not have the effect of barring retrial for murder following an appellate reversal of the manslaughter conviction for trial error. The Court, nevertheless found that the Georgia rule violated Price's federal constitutional right not to be placed twice in jeopardy.[18]

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[17] In *Vitale*, the Illinois Supreme Court had applied federal constitutional double jeopardy principles atop state law and found Vitale's second prosecution was barred by the first. If the federal issue had been governed by the state law premises in the Illinois Supreme Court's analysis, the Court would have been required to affirm. Instead, the Court reversed, distinguishing those issues governed by state and federal law. While the Illinois Supreme Court was free to construe its statutes in any way it chose, the federal constitutional effects of that were controlled by federal analysis.

[18] This Court's opinion in *Cichos v. Indiana*, 385 U.S. 76 (1976) is not contrary. What was decisive in *Cichos* was this Court's acceptance of the then state-law practice of instructing the jury to return a verdict on only one of two alternative charges. It was not the Indiana Supreme Court's decision regarding the effect of the jury's verdict, but rather, its enunciation of the rules of state procedure bearing on the proper interpretation of the verdict that controlled the outcome in that case. Cichos was tried when juries

In Schiro's case the federal court below mistakenly held itself bound by the state supreme court's legal conclusion that the silent verdicts were not acquittals for federal double jeopardy purposes. The consequences to be drawn from the silent verdicts is a federal issue which must be resolved through application of federal double jeopardy principles.[19]

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in Indiana had sentencing authority in non-capital cases. The two charges at issues defined the same crime but provided different penalties. Thus, the jury's silence on one could not be construed as an acquittal because the elements of each were the same.

[19] Even if state law controlled the determination of whether the silent verdicts constituted acquittals, Schiro would nonetheless be entitled to relief. The state court has, since at least 1844, consistently held "in interpreting [the Indiana] Constitution" that a silent verdict amounts to an acquittal when the jury returns at least one verdict in a multi-count charge. *Weinzorpflin v. State*, 7 Blackf. 186, 194 (Ind. 1844); *Anderson v. State*, 214 N.E.2d 172 (Ind. 1966) (where jury returned verdict finding defendant guilty of inflicting a wound while attempting to commit a robbery and was silent as to charge alleging assault and battery with intent to commit a robbery, the silent verdict amounted to a finding of not guilty); See also *Buckner v. State*, 253 Ind. 379, 248 N.E.2d 348, 351 (1969) ("Silence of the court on Count I is equivalent to a verdict of acquittal."); *Smith v. State*, 229 Ind. 546, 99 N.E.2d 417, 418 (1951) (same); *Dawson v. State*, 65 Ind. 442, 443-44 (1879) ("[N]o express finding was had upon second count. This was a legal acquittal of the larceny, and leaves the case before us the same as if the second count of the indictment was not in the record."); *Bonnell v. State*, 64 Ind. 498, 499 (1878) ("[T]he verdict of the jury was entirely silent as to the second count of the indictment. This silence of the verdict was equivalent to an express verdict of not guilt as to the second count of the indictment."); *Short v. State*, 63 Ind. 376 (1878) (same); *Bittings v. State*, 56 Ind. 101 (1877) (same). See also, *Tinker v. State*, 549 N.E.2d 1065 (Ind. App. 1990) (same). See discussion of the state court's opinion in *Cichos v. State*, 208 N.E.2d 685 (Ind. 1965), *supra* at 22-23, fn. 18.

The 3-member majority, in *Schiro*, did not overrule prior law; it cited nothing for the proposition that the silent verdicts did not constitute implicit acquittals. This "arbitrary disregard" for

2. *State law relevant to the federal analysis.*

a. *Relevant state law: when jeopardy begins and ends.*

There is no peculiar state statute or rule in Indiana that this Court must analyze to determine the double jeopardy issue presented.[20] Indiana law is consistent with traditional federal principles of double jeopardy.

State law, like federal law,[21] provides that jeopardy attaches when the jury is sworn. *Tyson v. State*, 543 N.E.2d 415 (Ind. App. 1989); Ind. Code § 35-41-4-3 (2). State law provides that jeopardy ends when the verdict is returned and accepted by the court.[22] *Gilmore v. State*, 98 N.E.2d 677, 680, fn. 1 (Ind. 1951); *West v. State*, 92 N.E.2d 852, 855 (Ind. 1950).

If the trial court becomes aware of a defect in the verdict before it is accepted and before the guilt trial jury is discharged, the court may resubmit the case to the jury to correct the defect. *Patton v. State*, 275 N.E. 2d 794 (Ind. 1971); *Langley v. State*, 267 N.E.2d 538

Schiro's rights alone violates federal due process. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980), see also, *James v. Kentucky*, 466 U.S. 341 (1984).

[20] The override provisions of the state death penalty statute are not controlling in this case because Schiro's acquittal occurred at the conclusion of the *guilt* trial.

[21] *Crist v. Bretz*, 437 U.S. 28 (1978).

[22] In Indiana, jeopardy may end prior to verdict if the court discharges a jury without manifest necessity. *Armontrout v. State*, 15 N.E.2d 363 (Ind. 1938) (where jury discharged due to prejudicial remarks made by defense counsel, there was no manifest necessity and state double jeopardy clause barred retrial); *State v. Wamire*, 16 Ind. 357 (1861) ("If the Court, without the consent of the defendant, discharged the jury to whom his cause has been submitted, before verdict, no imperious necessity rendering such discharge necessary, it works as an acquittal of the defendant . . ."); *Miller v. State*, 8 Ind. 325 (1856) ("The discharge of the jury must result from necessity, a necessity determined by law, or it will release the prisoner.").

(Ind. 1971); *Maynard v. State*, 508 N.E.2d 1346 (Ind. App. 1987); *King v. State*, 310 N.E.2d 77 (Ind. App. 1974); see also, *Martin v. State*, 154 N.E.2d 714 (Ind. 1958) (ambiguous verdict must be construed in favor of the accused).

As a matter of Indiana law, once a verdict is reached and accepted by the trial court, further factual determinations are prohibited. The entry of the verdict creates a bright line between the guilt trial and all proceedings thereafter. *Tinker v. State*, 549 N.E.2d 1065, 1067 (Ind. App. 1990), trans. den. (defendant charged with robbery, a class B felony, but found guilty of robbery, class C; court's order granting state's pre-sentencing request for additional fact findings supporting robbery as a class B felony and subsequent sentence on the class B felony held improper because "any amendment of the fact finding determination would violate [Tinker's] protection against double jeopardy.").

Once the jury returned its verdict of guilt on Count II, the court accepted that verdict and entered judgment [Tr. R. 128, 137; J.A. 42]. Jeopardy ended with this act.

b. *Relevant state law: Elements of Offenses and Definitions of those Elements.*

Schiro was charged with three counts at the guilt trial. Each of these counts contained elements that the others did not; the charged offenses were not the "same": [23]

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[23] *Mens rea* murder and felony murder are separate offenses for double jeopardy purposes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("The test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."). See also, *United States v. Dixon*, —— S.Ct. —— (1993).

	Count I, Mens Rea Murder	Count II, felony murder-rape	Count III, felony murder-deviate conduct
Mental State as to Killing	Knowingly	NONE	NONE
Killing Required	Kills another person	Kills another person	Kills another person
Additional Elements	NONE	While committing or attempting to commit rape	While committing or attempting to commit deviate conduct

The Indiana Supreme Court recognized that "[t]he crimes of murder and felony murder each contain elements different from the other but are equal in rank." *Schiro v. State*, 533 N.E.2d 1201, 1208. "[T]he state, in attempting to prove a felony-murder charge, need only establish that the defendant intended to commit the underlying felony; no evidence of an intent to kill need be introduced." *Head v. State*, 443 N.E.2d 44, 50 (Ind. 1982); citing, *Vertner v. State*, 400 N.E.2d 134 (Ind. 1980); *Cade v. State*, 264 Ind. 569, 348 N.E.2d 394 (1976); and *Wilson v. State*, 263 Ind. 469, 333 N.E.2d 755 (1975).

The applicable mental states are defined by Indiana law as follows:

> 1. "*Intentionally*": "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so."
>
> 2. "*Knowingly*": "[a] person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so."

Ind. Code § 35-41-2-2(a)-(b).

Under Indiana law, an "intentional" state of mind requires greater proof than a "knowing" one. *Case v. State*,

458 N.E.2d 223, 225 (Ind. 1984). In *Trevino v. State*, 428 N.E.2d 263, 267 (Ind. App. 1981), the court stated: "The highest degree of culpability is 'intentionally.' If conduct is engaged in 'intentionally,' it necessarily follows that it must be engaged in 'knowingly' also."

At the penalty trial, the state alleged two aggravating circumstances, both of which required proof that the killing was intentional [J.A. 6-7]. For purposes of capital sentencing, the definition of "intentionally" is the same as that set forth above. Ind. Code § 35-50-2-9(b)(1).[24]

c. *The relevance of the applicable state law.*

When the jury returned its single "guilty" verdict, there was no procedure available under Indiana law for the state to institute further fact finding proceedings on the guilt trial charges. *Tinker, supra.* That is plain, and plainly relevant. What is irrelevant and, respectfully, simply wrong, is the lower court's reliance upon the Indiana supreme court's conclusion that the silent verdicts were not acquittals.

B. The Silent Verdicts at the Guilt Trial Constitute an Acquittal Because the Jury Was Given an Opportunity To Convict Schiro and Did Not, and Because the Jury Intended To Acquit Schiro of the Charges Upon Which the Jury Was Silent.

The jury's failure to return a guilty verdict on Counts I and III represents an acquittal of those charges. Since

[24] Given the fact that the jury was instructed on both *mens rea* elements with respect to the count I charge, discussed *supra* at 8, fn. 7, the prosecution amended that charge. Under state law, the prosecution effectively amends the charge when, as here, different elements or degrees of offenses are provided to the jury without objection. *Rodriguez v. State*, 385 N.E.2d 1208 (Ind. App. 1979) (trial court's act of instructing the jury on the offense of only simple robbery when government had charged greater offense constituted an amendment of the charge).

the jury had an opportunity to convict Schiro on each count and was discharged without doing so, the silent verdicts are the constitutional equivalent of acquittals under established double jeopardy law. Moreover, review of the evidence presented, the verdict forms submitted, the responses to the jury's questions during deliberations, and the jury's penalty trial verdict, establish that the jury intended to acquit Schiro of those offenses.

This Court has previously confronted the issue of whether a jury's silence on one count of a multi-count charge represents an acquittal for double jeopardy purposes. In *Green v. United States*, 355 U.S. 184 (1957), the defendant was charged with first degree murder. The jury convicted him of the lesesr offense of second degree murder, but was silent as to the first degree murder charge. Green's conviction of second degree murder was reversed on appeal. On retrial Green was again tried for first degree murder. At the second trial he was convicted of the greater charge and he appealed arguing that his retrial for first degree murder was barred by the double jeopardy clause of the fifth amendment.

This Court concluded that Green's retrial for first degree murder violated the fifth amendment. This result rested on two grounds. First, the initial jury intended to acquit Green of first degree murder. Second, the jury was given the opportunity to convict Green of first degree murder and did not.

> [T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.

Id. at 191, 78 S. Ct. at 225 (emphasis added).

Likewise, in *Price v. Georgia*, 398 U.S. 323 (1970), this Court held that when the jury is silent on the greater offense and convicts the defendant of the lesser offense, the silent veridct is an acquittal. Thus, retrial on the greater offense following reversal on appeal violates the double jeopardy clause. *Price* reiterated the dual basis for the holding in *Green*:

> First, [the *Green* Court] considered the first jury's verdict of guilty on the second-degree murder charge to be an "implicit acquittal" on the charge of first degree murder. Second, and more broadly, the Court reasoned that petitioner's jeopardy on the greater charge had ended when the first jury "was given a full opportunity to return a verdict" on that charge and instead reached a verdict on the lesser charge.

Price, supra at 328-29.

Under either prong of the *Green/Price* analysis, there was an acquittal at the close of Schiro's guilt trial.

1. ***Schiro's jury was given the opportunity to convict him of the counts on which they remained silent and their falure to do so is the constitutional equivalent of an acquittal under established principles of double jeopardy law.***

Schiro was placed in jeopardy at the time his jury was sworn. *Crist v. Bretz, supra*; *Tyson v. State, supra.* "[T]he conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." *United States v. Jorn*, 400 U.S. 470, 480 (1971). One of the "principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury impaneled to try him. . . ." *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982).

Thus, as noted above, one of the reasons for the holding in *Green* that the silent verdict represented an acquittal was that the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." 355 U.S. at 191. This court further noted that "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial." *Id.* at 188. So long as jeopardy has attached, if the trial is terminated for any reason not constituting a manifest necessity, an acquittal results and retrial will be barred. *Id.*

In Schiro's case, there was no unforeseeable circumstance or manifest necessity which prevented the jury from impartially considering Schiro's guilt on all charged counts.[25] Because Schiro's jury was provided with a clear avenue to convict Schiro on each charged count—it was provided with a separate "guilty" form for each—his jury had an unimpeded opportunity to convict. It did not. Therefore, Schiro was acquitted of Count I, *mens rea* murder, and Count III, felony murder-criminal deviate conduct.

[25] When the trial judge terminates a trial prior to verdict the double jeopardy clause bars retrial unless the termination was occasioned by "manifest necessary." The manifest necessity standard "provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgment.'" *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (citation omitted). See also *Illinois v. Sommerville*, 410 U.S. 458 (1973); *Downum v. United States*, 372 U.S. 734, 736 (1963); *Lovato v. New Mexico*, 242 U.S. 199 (1916); *Thompson v. United States*, 155 U.S. 271 (1894). In each of these cases the issue involved whether the circumstances preventing the jury from considering the charge was serious enough to constitute a manifest necessity. In Schiro's case, the charges not only could have been submitted to the jury, but they in fact were submitted. See *Ortiz v. District of Las Animas*, 626 P.2d 642 (Colo. 1981) (where case submitted to jury on multiple counts and jury did not return a verdict on some of those counts, there was no manifest necessity and retrial was barred).

2. *Schiro's jury intended to acquit him of the offenses for which they returned no verdict.*

The jury's decision to acquit Schiro of Counts I and III was both rational and reasonable. Schiro raised two defenses to the charges: a special plea of not responsible by reason of insanity and a general "denial" [Tr. R. 95]. Under Indiana law, this plea permits the jury to consider, in addition to the insanity issue, whether the defendant was able to form the requisite intent due to a mental impairment and whether the defendant is guilty but mentally ill of the crimes charged.[26]

An examination of the facts established at trial, the framework provided by the verdict forms, the questions sent to the court during guilt trial deliberations, and the jury's penalty trial determination, reveals that the central disputed issue was whether Schiro knowingly killed or whether, instead, the victim died at the hands of a "sick, rejected and tormented creature" [27] who was incapable of forming the intent to kill.

[26] Indiana, unlike other states, does not recognize a separate legal defense of diminished capacity. *Cardine v. State*, 475 N.E.2d 696 (Ind. 1985). Nor does Indiana recognize "degrees of insanity". *Id.* (citations omitted). However, mental health evidence may be admitted and considered to negate the specific intent where, as here, the defense of insanity is raised. *Id.*, see also, *Brown v. State*, 448 N.E.2d 10, 19 (Ind. 1983).

Other areas in Indiana law similarly recognize that mental state evidence, standing alone, may serve as a defense to the extent it negates the requisite *mens rea* element. Ind. Code § 35-41-3-7 (mistake of fact is a defense to the extent it "negates the culpability required for commission of the offense."). Likewise, intoxication is a defense to the extent that it negates *mens rea*. *Street v. State*, 567 N.E.2d 102, 104 (Ind. 1991).

[27] *Schiro v. State*, 451 N.E.2d at 1070 (Prentice, dissenting).

a. *The facts established at trial demonstrate the jury's decision to acquit Schiro of* mens rea *murder was rational and well within the evidence.*

The jury was inundated with evidence regarding Schiro's mental status, and consequently, whether he was capable of forming the intent to kill. Because of this evidence, the trial prosecutor was fearful that the state would not obtain a conviction. He testified at the first post-conviction hearing:

> [T]here were two times that I felt in great jeopardy. The first one was when the jury was considering, uh, the question of guilt or innocence, because I felt the question of the returning of a verdict had been, of guilty as charged, was in serious danger because of [defense counsel's] masterful portrayal of the Defendant as a sick, wounded bird in need of help, rather that (sic) a vicious criminal.

[PCR2.R. 194].

Preliminary instructions regarding the state's burden on the *mens rea* charge [J.A. 11, 15]; the definition of insanity [J.A. 15]; and the respective burdens of proof [J.A. 15], set the stage for the trial evidence.[28]

As in other trials involving mental health-related defenses, Schiro's jury heard testimony from mental health experts. However, unlike many trials where the defendant's mental health is in issue, Schiro's jury actually heard *some* agreement among the five experts. The dispute among the experts concerned *not* whether Schiro suffered from a mental disorder, but whether his mental disorder constituted legal insanity.

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[28] The jury received even more extensive final instructions on this and related topics. Seventeen (17) of a total of thirty-eight (38), final instructions pertained to the state's burden on the mens rea *murder charge and the mental health defenses. See fn. 41, infra* at 43-44.

Court-appointed expert, Dr. Charles Crudden, told the jury, that Schiro had a mental disorder [Tr. R. 1207, 1209]. Among other things, Dr. Crudden discussed Schiro's blunted affect [Tr. R. 1219]; his rapid and digression-ridden speech patterns [Tr. R. 1268-9]; and his sexual dysfunction [Tr. R. 1207-08, 1228-29]. Court witness Dr. Woods described Schiro's feelings as rather "primitive"—similar to an infant's feelings about hurting or being hurt—and concluded that Schiro was mentally ill [Tr. R. 1412, 1415]. Similarly, state's witness, Dr. David Crane, found that Schiro had "emotional difficulties" of "long standing duration" and concluded that these problems were a significant part of his make-up [Tr. R. 1871, 1877]. However, each of these experts concluded that Schiro was sane.

Defense experts, Drs. Frank Osanka and Edward Donnerstein, were the only experts who determined that Schiro was legally insane [Tr. R. 1639-40, 1691-92]. Dr. Osanka was the only witness who testified that Scihro was both legally and medically insane; he determined that Schiro suffered from schizophrenia [Tr. R. 1692].

From extensive interviews with Schiro and his family, Dr. Osanka determined that Schiro's belief system was greatly influenced by his exposure to pornographic films beginning around age 6½ [Tr. R. 1710]. Because this influence occurred at such a young age, Schiro was unable to integrate this information into his behavior in a healthy manner [Tr. R. 1719]. As such, what "he did in secret, is that he integrated his own definition of sexuality and right and wrong about sex for that matter" [Tr. R. 1718]. Thus, Schiro never understood, as others do, the difference between healthy and violent sexual relations. Dr. Osanka agreed with Drs. Crudden and Woods that Schiro met the definition of sexual sadism [Tr. R. 1721], but concluded that diagnosis alone did not adequately define the complexity of Schiro's mental disability [Tr. R. 1781-83].

Had the jury determined that Schiro suffered from schizophrenia, it was not obliged to find that he was not guilty by reason of insanity. Drs. Woods and Crane testified that the "legal" definition of "insanity" was not the same as the "medical" (or "psychiatric") definition of insanity [Tr. R. 1408, 1871-72].[29] The prosecutor asked Drs. Woods, Crudden and Crane if, assuming a person suffered from schizophrenia, that disorder necessarily amounted to "legal" insanity [Tr. R. 1227, 1409, 1884]. All replied that it did not [Tr. R. 1227, 1409, 1884]. At the state's request, an instruction was given which informed the jury that "medical" insanity was not the same as "legal" insanity [J.A. 28]. The jury was also instructed that the testimony of lay witnesses could be considered in determining Schiro's mental state [J.A. 28]. As set forth in fn. 5, *supra* at 7, the jury heard from lay witnesses regarding Schiro's bizarre behavior.

The only witness who testified from personal knowledge regarding Schiro's upbringing was his adopted father, Thomas Schiro, Sr. [Tr. R. 1502 et seq.]. The jury heard that Schiro's parents had taken him to several pediatricians and psychiatrists, and had otherwise sought assistance for him, from the time he was three years old until he was twenty [Tr. R. 1505, 1507, 1508, 1509, 1512, 1513, 1518, 1520]. The jury also heard that Schiro's adopted parents tried to have him placed in a mental institution [Tr. R. 1516-18].

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[29] Dr. Crane testified that "there is a difference between being insane medically or psychiatrically and being insane legally." [Tr. R. 1871]. Specifically, "an individual could commit an act and qualify within the legal definition of legal insanity. A person who may be full blown crazy, crazy could in fact engage in an activity that was clearly legally sane. He could be spaced out and still understand rightfulness and wrongfulness of conduct and be crazy and still realize and control his conduct to the requirements of the law so . . . the law specifically, I think is worded in such a way that both normal and abnormal could be disqualified regardless of their emotional difficulties." [Tr. R. 1871-72].

State's witness Mary Lee was the only other lay witness who had spent a substantial amount of time with Schiro on a daily basis. Lee, who had lived with Schiro for approximately 2 years, described Schiro's sudden and unexplained mood swings and outbursts [Tr. R. 1483]. She testified that he had no control over his actions and that he hated doing some of the things he did [Tr. R. 1480-1481]; she knew this because he would constantly say "why do I do these things . . . help me stop . . . what can I do to quit this . . . I don't want to do this anymore." [Tr. R. 1481].[30]

If, as the prosecuting attorney feared, the jury found that Schiro's mind was sick, it had at least three options: (1) it could find Schiro not guilty by reason of (legal) insanity; (2) it could determine that Schiro was guilty but mentally ill; or (3) it could acquit Schiro of the *mens rea* murder because he was unable to form the

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[30] Lee also testified about Schiro's strange sexual patterns [Tr. R. 1443, 1445, 1447-50, 1458-61]. She also stated that Schiro had a relationship with a mannequin in a local department store window; he would become upset when the mannequin's clothes were changed [Tr. R. 1469-70]. Lee further testified that: Schiro could not manage to stand or sit still and always bobbed back and forth [Tr. R. 1476]; he behaved as if he believed people were watching him or were hiding in the vicinity [Tr. R. 1476]; he was unable to open up to people and believed that people only acted like they were your friends [Tr. R. 1474]; he had no friends [Tr. R. 1475]; he was addicted to pornography [Tr. R. 1479]; in December of 1979 and January of 1980 he refused to take a bath for a month and wore the same clothes for that same period refusing to permit Lee to wash them [Tr. R. 1471-72]; he would require that she refer to her son as "our son" even though he was not the child's biological father [Tr. R. 1471]; he would bite his fingertips until they bled resulting in their permanent disfigurement [Tr. R. 1472]; he was subject to sudden mood changes [Tr. R. 1463]; he once chased her and appeared as if he was possessed [Tr. R. 1465-66]; and he would do violent things and then be remorseful [Tr. R. 1466, 1480-81]. Lee concluded that Schiro was aware of what other people thought was right and wrong but that "inside of himself it didn't make any sense" [Tr. R. 1478] and that he was very sick [Tr. R. 1481].

requisite intent to kill. The plethora of evidence presented on Schiro's mental state shows that the jury had both a rational and sensible reason to determine that Schiro was incapable of forming the specific intent to kill. The prosecutor's observations demonstrate that it was objectively reasonable. It expressed that conclusion in the only way it could—it returned a silent verdict on Count I.[31]

b. ***Contrast between verdict forms and possible verdicts.***

The jury received a single "not guilty" form for the three murder counts, but they received separate verdict forms for "guilty" on each charged count. A comparison of the *verdict forms* submitted and the *possible verdicts* demonstrates the way in which the verdict forms required the jury to express an acquittal on some of the counts by resort to silent verdicts.

Because there were no individual "not guilty" verdict forms for each count, the framework placed the jury in a position where it was unable to rely solely on the forms to express any decision other than guilty of all three counts, or not guilty of all three counts. For example, if the jurors concluded that Schiro was guilty of the two felony murder counts, but not guilty of the *mens rea* murder count, the jury would have had no verdict form to express the *mens rea* murder acquittal. The only way for the jury to express this conclusion would have been to return the two "guilty" forms on the felony murder counts and to remain silent on the *mens rea* murder charge. The sole "not guilty" form they were given could only be used to acquit of *all* charges.

Given the special plea of not guilty by reason of insanity, and the two additional options that stemmed from

[31] The jury also had a rational and sensible basis upon which to acquit Schiro on Count III. See footnote 32, *infra* at 37.

it, had the jury determined that Schiro was "insane" or "guilty but mentally ill" at the time of the crime, they would have properly returned the respective available verdict form. Conversely, had the jury determined that Schiro was incapable of forming the specific intent to kill required in Count I, the framework provided no option to explicitly convey this decision; resort to silent verdicts would have been necessary.

The jury found Schiro guilty of only felony murder—rape. It is here that the jury's silence on Count III becomes indicative. The instructions provided to the jury on Count III informed them that in order to find Schiro guilty of that count, they had to determine that Schiro killed "*while* . . . committing criminal deviate conduct." [J.A. 21] (emphasis added). No further instruction on this element was provided. As to Count II, the defense was careful to point out, through all available witnesses, that the act of criminal deviate conduct occurred *after* death.[32]

[32] The jury's acquittal of felony murder—criminal deviate conduct was likewise certainly dictated by the evidence presented at trial and the instructions given regarding the elements of that offense. The state charged that Schiro killed "while" committing criminal deviate conduct [J.A. 5]. The jury was instructed that the state had to prove the killing occurred "while" the defendant was committing or attempting to commit criminal deviate conduct [J.A. 11, 21]. The verdict form submitted on this count contained the same language requiring a nexus between the killing and the criminal deviate conduct.

Criminal deviate conduct, as charged by the state, requires proof of penetration of the sex organ by an object [J.A. 5]. The pathologist testified that some of the bruising to the decedent could have occurred post-mortem [Tr. R. 643-46]. Although the state did introduce a plastic phallus, the only evidence offered to establish that the plastic phallus was used to penetrate the decedent established that this act occurred after death [Tr. R. 1739].

Mary Lee was the only lay witness with whom Schiro discussed the entire events of the crime. On cross-examination, Lee testified

Given the single "not guilty" verdict form that covered all three counts, the only way for the jury to demonstrate that it found Schiro guilty of Count II, and not guilty of Counts I and III, was to return the Count II verdict form alone.[33] Reasonable jurors would assume if they returned the "not guilty" form (because of their determination on Counts I and III) that such action would be interpreted to mean they found Schiro both guilty and not guilty of Count II. The jury implicitly acquitted on Counts I and III.

c. *Jury questions.*

In response to the jury's request during guilt trial deliberations, and by agreement of the parties, the court reread three instructions to the jury [Tr. R. 128]. Those instructions concerned the following matters of law: 1) the defense of insanity and the definition of "mental disease or defect" [J.A. 22], 2) the definition of criminal deviate conduct [J.A. 30], and 3) the verdict of guilty but mentally ill and the definition of "mentally ill." [J.A. 30]. The request for additional guidance indi-

that Schiro confessed to her that the act of criminal deviate conduct occurred after death [Tr. R. 1490-1491]. Dr. Osanka similarly testified [Tr. R. 1738-39].

From this evidence, the charge, the instructions, and the verdict forms the jury likely concluded that the state failed to sustain their burden of proving beyond a reasonable doubt that the killing occurred "while" the defendant was committing criminal deviate conduct.

The jury evidenced its conclusion that Schiro committed the killing when it convicted on Count II, felony murder-rape. Thus, the jury must have concluded that the state did not prove beyond a reasonable doubt that Schiro committed the underlying offense of killing while committing criminal deviate conduct.

[33] The jury was told that "the court is submitting to you forms of possible verdicts you may return in this case." [J.A. 27]. The jury was *not* instructed that it could, if it so chose, write its own verdict forms.

cates, at a minimum, that the jury was considering the mental health evidence and the charges contained in Count I, *mens rea* murder, and Count III, felony murder —criminal deviate conduct.

d. *Penalty trial verdict.*

The jury's penalty trial verdict illuminates its guilt trial verdicts. The jury was given three sentencing options: a recommendation of death; a recommendation against death; or no recommendation. After sixty-one minutes [Tr. R. 109], the jury unanimously recommended against the death penalty [J.A. 40].

This recommendation, and the speed with which it was returned, suggests strongly that the jury, having previously rejected the state's proof on *mens rea* murder, viewed the killing as the byproduct of the rape and Schiro's sexual dysfunction and rejected the notion that the killing was intentionally committed.[34]

C. The Guilt Trial Acquittals Barred Imposition of the Death Sentence.

In order to properly sentence Schiro to death on the charged aggravating factors, and to override the jury's recommendation for life, the trial judge had to determine that Schiro "intentionally" killed.[35] Such a finding was

[34] Having previously rejected the state's proof on felony murder-criminal deviate conduct, the jury likewise rejected the Count IIIA aggravator (intentional murder during criminal deviate conduct).

[35] As discussed *supra*, at 26-27, under Indiana law an "intentional" state of mind is the highest level of intent in the criminal code and a "knowing" state of mind is a "lesser included" element of an "intentional" state of mind. *Case v. State*, 458 N.E.2d 223, 225 (Ind. 1984); *Trevino v. State*, 428 N.E.2d 263, 267 (Ind. App. 1981); Ind. Code § 35-42-2-2(a)-(c). See also, *State v. Willis*, 552 N.E.2d 512, 516 (Ind. App. 1990).

Conviction of a lesser included offense bars trial for the greater if all facts for the greater have occurred or could have been dis-

unlawful because Schiro had been acquitted at the guilt trial of *mens rea* murder. Schiro could be lawfully sentenced to death only if the state proved beyond a reasonable doubt that the killing was "intentional" and committed during the course of or during the attempt to commit rape or criminal deviate conduct. Ind. Code 35-50-2-9(b)(1). Schiro's jury acquitted him of *mens rea* murder at the guilt trial; yet, in sentencing Schiro to death, the trial court found the existence of a single aggravating factor—that Schiro *intentionally* killed during the course of a rape. *Schiro v. State*, 451 N.E.2d 1047, 1058 (Ind. 1983). This act renders Schiro's death sentence violative of the double jeopardy clause of the fifth amendment because the state is prohibited from attempting to prove at sentencing that which they failed to prove in the guilt trial; specifically, that Schiro intended to kill.[36]

D. Established Principles of Collateral Estoppel Bar Imposition of the Death Penalty Because the Jury Resolved Facts in the Guilt Trial Adversely to the State and These Facts Were a Condition Precedent to Lawful Imposition of the Death Penalty.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court recognized that the doctrine of collateral estoppel is embodied in the double jeopardy clause of the fifth amendment made applicable to the states through the fourteenth amendment.

Ashe was charged with six counts of robbery and one count of car theft arising from a robbery of six persons playing poker. Ashe initially went to trial for the robbery

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covered by due diligence. *Brown v. Ohio*, 432 U.S. 161 (1977). The jury's silence on the greater offense when coupled with a conviction for the lesser offense opeartes as an acquittal of the greater. *Green v. United States, supra.*

[36] It is relevant to note that the trial judge did not find the other charged aggravator, specifically that: Schiro intentionally killed during the course of criminal deviate conduct [J.A. 45-50].

of Knight, one of the poker players. The proof that a robbery had occurred was "unassailable." *Id.* at 438. The sole issue at trial was whether Ashe had committed the robbery. He was found not guilty. Shortly thereafter Ashe was brought to trial again for the robbery of another of the poker players. The state buttressed its identification evidence at the second trial and Ashe was convicted.

The doctrine of collateral estoppel stands for the proposition that "when an ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. This Court noted that when a previous judgment of acquittal is based upon a general verdict, application of collateral estoppel principles requires the Court to " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at 444 (citation omitted).

The Court looked to the evidence, the charge, and the jury instructions at Ashe's first trial and concluded that the doctrine of collateral estoppel barred Ashe's trial for the robbery of any of the other poker players. This Court noted:

> Once the jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon

the issue of whether the petitioner was one of the robbers.

Id. at 446.

An examination of the evidence, pleadings and instructions in Schiro's case shows that he is entitled to relief under *Ashe*. See also *Bullington v. Missouri*, 451 U.S. 430 (1981).

1. What material facts were in dispute at Schiro's trial?

a. *Trial evidence.*

As set forth fully *supra* at 32-36, evidence of Schiro's mental state pervaded the guilt trial. Thus, the "unassailable" facts were that a killing and a rape occurred and that Schiro committed those acts. *Ashe*. What was disputed, and relevant to the *Ashe* inquiry, was Schiro's mental state.

b. *Pleadings.*

The pre-trial pleadings demonstrate that intent was a material disputed fact. Seven of ten motions filed by the defense centered on Schiro's mental state: (1) "Motion to Have the Defendant Placed Under Observation" [Tr. R. 31];[37] (2) "Motion for Additional Psychiatric Appointment" [Tr. R. 36]; (3) "Notice of Intent to Interpose the Defense of Insanity" [Tr. R. 55]; (4) "Motion to Have the Defendant Placed Under Institutional Observation or in the Alternative, to be Incarcerated in a Facility Other Than the Vanderburgh County Jail" [Tr.

[37] In this motion, counsel alleged that Schiro was in need of "isolation, observation and treatment by psychiatric authorities to prevent the defendant from bringing harm to himself" [Tr. R. 32]. The trial court denied this motion, but did order, at Schiro's request, mental health professionals to evaluate Schiro for sanity and competency [Tr. R. 34].

R. 67];[38] (5) "Motion for Further Examination", requesting that Schiro be permitted to be examined by two psychiatrists of his own choosing and paid for by his parents [Tr. R. 69]; (6) "Motion for Appointment of Expert for Trial" [Tr. R. 93];[39] and (7) "Answer to Discovery Motion" where Schiro listed his defenses as "Not guilty (general denial)" and "Insanity" [Tr. R. 95].[40]

c. *Instructions.*

The jury received extensive guilt trial instructions regarding the mental state defenses and the state's burden on the charged counts.[41]

[38] This motion alleged that since his incarceration Schiro "has attempted suicide, has refused to eat for prolonged periods of time, has expressed his desire to die on numerous occasions, and has suffered a deterioration of his mental condition." [Tr. R. 67]. Schiro asked to be moved to an appropriate hospital or psychiatric institution [Tr. R. 67].

[39] In this motion, counsel noted that the state had the benefit of a number of persons assistance at trial. Since counsel had been appointed by the court, due to Schiro's indigency, and did not have the assistance of any other person, counsel requested that Dr. Frank Osanka be appointed to assist counsel at trial with ". . . cross examination of the State's witnesses and court appointed psychiatrists." [Tr. R. 93]. (Dr. Osanka had been retained by Schiro's family to assist in the preparation of Schiro's mental health defenses, however, the family had expended their available resources prior to trial and were unable to continue to pay Dr. Osanka. [Tr. R. 93].)

[40] In his discovery response, Schiro listed two groups of exhibits that he intended to offer at trial, both of which supported his mental health defenses: (1) "photos of a manikin at DeJong's"; and, (2) "letters written by the defendant to Mary T. Lee and Dr. Walt Abendroth" [Tr. R. 95].

[41] The court instructed the jury that: (1) the burden on the defense of insanity rested with the defendant by a preponderance of the evidence [J.A. 21]; (2) the elements of murder and felony murder [J.A. 21]; (3) the definitions of "intentional" and "knowing" [J.A. 22]; (4) the definition of the defense of insanity

2. *The issues of material fact were determined in Schiro's favor by a valid and final judgment.*

As illustrated, *supra* at 27-39, Schiro was acquitted of Counts I and III when the jury returned a single verdict at the close of the guilt trial which expressed its determination that Schiro was guilty of Count II, felony murder-rape. A valid and final judgment was entered on Schiro's conviction on Count II the same day the verdict was returned [Tr. R. 109, 137].

3. *The same parties relitigated the material facts at the death penalty trials.*

The document charging Schiro with Counts I-III was filed by the State of Indiana [J.A. 3-5]. The same parties were identified in the document requesting the death penalty [J.A. 6-7].

The death request was based on two aggravating factors [J.A. 6-7]. The "intentional" killing element was

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[J.A. 22]; (5) the definition of "mental disease" and "mental defect" [J.A. 22]; (6) the elements of *mens rea* murder as applied in Schiro's case [J.A. 22-23]; (7) the procedure following a verdict of not guilty by reason of insanity should not motivate the jury [J.A. 23]; (8) Schiro is not required to prove his innocence, but he is required to prove insanity by a preponderance of the evidence [J.A. 23-24]; (9) if Schiro is found not guilty by reason of insanity the court will conduct a mental competency hearing [J.A. 26]; (10) jury must decide extent of Schiro's mental disability from consideration of all evidence, including expert testimony [J.A. 26]; (11) medical insanity is not the same as legal insanity [J.A. 28]; (12) lay witness may express opinion on question of insanity [J.A. 28]; (13) jury is not bound to accept the opinion of experts on the issue of sanity [J.A. 28-29]; (14) the verdict of guilty but mentally ill and the definition of mental illness [J.A. 30]; (15) burden upon state to disprove mental illness for purposes of guilty but mentally ill verdict [J.A. 31]; (16) definition of preponderance of the evidence [J.A. 33]; and (17) jury should not find Schiro guilty for sole purpose of discouraging persons from raising insanity defense [J.A. 35].

common to both. Whether Schiro was capable of forming the requisite intent to kill was the central disputed issue at the guilt trial—that issue was resolved in Schiro's favor when he was acquitted of *mens rea* murder, Count I. In returning their guilt trial verdict, the jury expressed its conclusion that Schiro did not possess the requisite intent to kill. There is simply no other basis from the evidence, instructions or pleadings, which tends to suggest that the acquittals were based upon any determination other than that the state did not prove, beyond a reasonable doubt, that Schiro meant to kill. Once this determination was made, the state was collaterally estopped from requiring Schiro to run the gauntlet again at sentencing.[42]

As in *Turner v. Arkansas*, 407 U.S. 366 (1972) and *Harris v. Washington*, 404 U.S. 55 (1971), the material facts determined in Schiro's favor by virtue of the guilt trial verdicts were the same as the material facts at issue in the two charged aggravating circumstances.[43]

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[42] In fact, the mental state charged in Count I was less than the mental state required for the aggravating circumstances. See *infra* at 26-27. See also *Brown v. Ohio*, 432 U.S. 161 (1977) (conviction of lesser included offense bars trial for the greater if all facts for greater have occurred or could have been discovered by due diligence).

[43] Ind. Code § 35-50-2-9(b) provides that the state must prove the existence of the aggravating circumstance beyond a reasonable doubt. Because the prosecution's burden of proof on the *mens rea* element at the guilt trial was the same as its burden at the penalty trial, no issue of relative burdens of proof is presented. See *Dowling v. United States*, 493 U.S. 342 (1990); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

CONCLUSION

For all of the above argued reasons Schiro respectfully moves the Court to remand his case to the district court and order that court to grant the writ and vacate Schiro's death sentence, and for any and all other relief to which he may be entitled.

Respectfully submitted,

MONICA FOSTER *
(Appointed by this Court)
HAMMERLE AND FOSTER
500 Place
501 Indiana Ave. Suite 200
Indianapolis, IN 46204
(317) 630-0137

RHONDA LONG-SHARP
Indianapolis, IN
IRA MICKENBERG
New York, NY
Counsel for Petitioner

* Counsel of Record

APPENDIX

APPENDIX

35-50-2-9. Death sentences.—(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

* * * *

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme Court has completed its

review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, § 122].

35-41-4-3. Prosecution barred for same offense.—(a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:

(1) The former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.); or

(2) The former prosecution was terminated after the jury was impaneled and sworn, or, in a trial by the court without a jury, after the first witness was sworn, unless (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination, (ii) it was physically impossible to proceed with the trial in conformity with law, (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state, (v) the jury was unable to agree on a verdict, or (vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred. [IC 35-41-4-3, as added by Acts 1976, P.L. 148, § 1; 1977, P.L. 340, § 18.]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 8, 1992

Before
HON. WALTER J. CUMMINGS, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. HARLINGTON WOOD, JR., Senior Circuit Judge

No. 91-1509

THOMAS SCHIRO,
Petitioner-Appellant,

vs.

RICHARD CLARK, Superintendent, and
INDIANA ATTORNEY GENERAL,
Respondents-Appellees

Appeal from the United States District Court
for the Northern District of Indiana
South Bend Division

No. 83 C 588—Allen Sharp, *Chief Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by petitioner-appellant on August 21, 1992, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.